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No. _____

In The

# Supreme Court of the United States

October Term, 1989

MICHAEL ROBERT LAYKIN,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT C. MOEST
*Counsel of Record*
DAVID GROSZ
FLEISHMAN, FISHER & MOEST
2049 Century Park East
Suite 3160
Los Angeles, California 90067
(213) 557-1077

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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## QUESTIONS PRESENTED

1. Whether 12 U.S.C. § 1709-2, which makes criminal certain purchases of real property on which mortgages are held by the FHA or VA, requires that the defendant know or should know that the mortgages are federally held, since the "willfulness" requirement precedes the element of FHA or VA involvement and the rule of lenity requires the resulting ambiguity to be resolved in the defendant's favor.

2. Whether the requirement of 12 U.S.C. § 1709-2 that one engage in a "pattern or practice of . . . applying . . . rents . . . for his own use" is met when the vast bulk of the rents received went to property management fees, improvements and repairs; and whether the evidence at trial established a "pattern or practice" within the meaning of the statute.

3. Whether irreconcilable inconsistencies among the indictment, the jury instructions and the evidence at trial as to the duration of the conspiracy, combined with the introduction of testimony of members of an earlier, unrelated conspiracy, required dismissal of the indictment or a new trial.

## PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Dennis Lee Crain was a defendant-appellant.

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Michael R. Laykin petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit filed September 26, 1989, as to which rehearing was denied December 7, 1989.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 886 F.2d 1534 (9th Cir. 1989), and is set forth at App. 1-27. The unreported order denying rehearing and declining rehearing en banc is set forth at App. 30. The unreported oral ruling on Laykin's motion to dismiss appears at App. 28-29.

## JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was filed September 26, 1989. Laykin's petition for rehearing was denied on December 7, 1989. This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

12 U.S.C. § 1709-2 provides as follows:

> Whoever, with intent to defraud, willfully engages in a pattern or practice of –
>
> (1) purchasing one- to four-family dwellings (including condominiums and cooperatives) which are subject to a loan in default at

time of purchase or in default within one year subsequent to the purchase and the loan is secured by a mortgage or deed of trust insured or held by the Secretary of Housing and Urban Development or guaranteed by the Veterans' Administration, or the loan is made by the Veterans' Administration,

(2) failing to make payments under the mortgage or deed of trust as the payments become due, regardless of whether the purchaser is obligated on the loan, and

(3) applying or authorizing the application of rents from such dwellings for his own use,

shall be fined not more than $250,000 or imprisoned not more than 5 years or both. This section shall apply to a purchaser of such a dwelling, or a beneficial owner under any business organization or trust purchasing such dwelling, or to an officer, director, or agent of any such purchaser. Nothing in this section shall apply to the purchaser of one such dwelling.

18 U.S.C. § 371 provides as follows:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

## STATEMENT OF THE CASE

Michael Laykin was convicted on February 11, 1988, of equity skimming and conspiracy to commit equity skimming, in violation of 12 U.S.C. § 1709-2 and 18 U.S.C. § 371.[1] The district court had original jurisdiction under 18 U.S.C. § 3231.

"Equity skimming" was made a crime in 1970 after the Federal Housing Administration and the Veterans' Administration suffered losses under their mortgage insurance programs. Some other federal insurance and housing programs are similarly protected. *See* 12 U.S.C. § 1715z-4 (pertaining to multiple dwellings with more than four units).

T L Corporation, in which Michael Laykin was a principal,[2] purchased homes subject to loans in default, a common practice that can be profitable for the investor and sharpens the efficiency of the market. At the time Laykin purchased houses in Las Vegas, housing prices had been declining and interest rates rising for some time. In this climate, investors, expecting interest rates to fall and prices to increase, bought properties with the

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[1] As shown in the petition, the indictment did not charge, and the government did not prove, the requisite intent for violation of the equity skimming statute, 12 U.S.C. § 1709-2. Because conspiracy requires at least the same degree of intent as the substantive offense, *e.g.*, *Ingram v. United States*, 360 U.S. 672, 678 (1959), the conviction for conspiracy to violate the statute must also be reversed.

[2] Laykin was the "L" of T L. "T" was Robert Terry, a California businessman who was not indicted and did not testify at trial.

idea of refinancing them and reselling them at a profit. If their predictions did not bear out they might well be unable to repay outstanding notes on the houses.

Under section 1709-2, this behavior can be a crime. Whether or not it is depends entirely on the actor's intent. Clear delineation of criminal intent in the statute is essential.

Section 1709-2 is directed toward the purchaser who collects rents on houses with FHA- or VA-insured mortgages (usually in cash), fails to make mortgage payments, and allows the houses to deteriorate. Ultimately, the lender would foreclose, and, because the house would be worth considerably less than the amount due on the mortgage, the FHA or VA would pay the difference, plus costs, under their insurance policies. The interim owners "skim" equity by pocketing the rents, rather than using them to maintain the property or to make payments on the outstanding debt.

This was not Laykin's modus operandi. T L Corporation purchased approximately 125 homes in Las Vegas, six of them insured by the FHA or VA. The houses were purchased beginning in August 1985. The rental income derived from the properties was used almost exclusively to manage, improve and repair the houses. As much as half the rent was retained as commissions and fees by successive, independent property managers who spent much of the rest on improvements and repairs.[3]

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[3] The government conceded in its closing argument that very little of the money had gone to Laykin. At the conclusion

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Foreclosure procedures were nevertheless commenced on all the properties by the following year. Moreover, the government's witnesses repeatedly testified that, throughout the time T L Corporation owned houses, T L tried to refinance the loans or to retire them by raising capital through a public offering.

Laykin argued below that the indictment and jury instructions were defective because they did not properly define the intent required under section 1709-2. He urged that the government had to prove that he knew or should have known that FHA- or VA-insured dwellings were being purchased.

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of the case, the trial judge admitted he was still perplexed about where the money went.

> I would say of the many cases that I've heard over the years, . . . eleven years either in the federal court or in the state system, this one leaves some questions in my mind about exactly what happened with the money, where it went, and what happened, in connection with the payments and possible diversion of funds, and that there are a number of unanswered questions in this case.

Transcript of Proceedings, July 20, 1988, at 43.

## REASONS FOR GRANTING THE PETITION

### 12 U.S.C. § 1709-2 IS AT LEAST AMBIGUOUS ABOUT WHETHER THE DEFENDANT MUST HAVE ACTUAL OR CONSTRUCTIVE KNOWLEDGE THAT PROPERTIES INVOLVED IN EQUITY SKIMMING ARE FINANCED BY FHA- OR VA-INSURED LOANS. THE RULE OF LENITY THEREFORE REQUIRES THAT PETITIONER'S CONVICTION BE REVERSED.

1. *Introduction.* Under the statute Michael Laykin was convicted of violating, 12 U.S.C. § 1709-2, not only must one act with the intent to defraud, but one must "willfully engage[ ] in a pattern or practice" of "(1) purchasing . . . dwellings . . . subject to a loan . . . secured by a mortgage . . . insured or held by" the FHA or VA.

Thus, "willfully" appears before any of the elements of the offense (except the intent to defraud). "Willfully" therefore appears to modify all that follows. Nothing in the language of the statute, on any reading, adequately and clearly distinguishes what must be willful from what need not be. At the very least, therefore, section 1709-2 is ambiguous on whether the government must prove that a defendant had actual knowledge (or perhaps only constructive knowledge, *see United States v. Yermian*, 468 U.S. 63 (1984)), that dwellings were subject to loans insured by the Veterans Administration or the Federal Housing Administration.[4]

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[4] Shortly after the equity skimming statute was enacted, the government appeared to agree that the act required knowledge of FHA or VA involvement. In *United States v. Berg*, 390 F. Supp. 8 (C.D. Cal.), *aff'd*, 539 F.2d 718 (9th Cir. 1975), the indictment under § 1709-2 charged the defendants "with engaging a pattern of practice of . . . purchasing one-family

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"[W]hen a choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *Dowling v. United States*, 473 U.S. 207, 214 (1985); *accord, Williams v. United States*, 458 U.S. 279, 290 (1982); *United States v. Bass*, 404 U.S. 336, 347 (1971); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952). Here, the indictment should have alleged and the jury instructions should have required a finding that the defendant knew that the loans in question were VA- or FHA-insured.

The Court has on several recent occasions grappled with the interpretation of federal criminal statutes in light of the rule of lenity, particularly in connection with the mens rea required for guilt. *See, e.g., Liparota v. United States*, 471 U.S. 419, 427-28 (1985) (refusing to impose strict liability for misuse of food stamps); *United States v. Yermian*, 468 U.S. 63, 71-74 (1984) (declining to find that "willfully" in 18 U.S.C. § 1001 modified elements of offense preceding it).

More guidance is needed by the lower courts in performing the difficult task of recognizing statutory ambiguity in this area. The circuits have reached opposite

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dwellings which were subject to a federally insured deed of trust which was in default at the time of purchase." 390 F. Supp. at 8. The indictment also charged that the proscribed acts "were done with the intent to defraud the governmental insuring agency and that the Federal Housing Administration (FHA) or the Veterans Administration (VA) was actually caused large monetary damages." *Id.* at 8-9.

results in cases involving essentially the same question of grammatical construction. *Compare United States v. Laykin*, 886 F.2d at 1537-39, App. 10-13 (finding that "willfully" did not modify subsequent elements of offense) *with United States v. Nofziger*, 878 F.2d 442, 445-54 (D.C. Cir.) (finding that "knowingly" modified all subsequently stated elements of 18 U.S.C. § 207(c)(1982)), *cert. denied*, 110 S. Ct. 564 (1989).

Even within the narrow domain of equity skimming, the application of the rule of lenity is inconsistent. *United States v. Capano*, 786 F.2d 122 (3d Cir. 1986), found 12 U.S.C. § 1715z-4, an analogue to section 1709-2, ambiguous and construed it narrowly. The court below asserted that even though section 1715z-4 is ambiguous, section 1709-2 is not, 886 F.2d at 1537-38, App. 9-14, but the distinction is unexplained and untenable.

Except for a 1975 district court opinion, *see supra* note 4, there were, until recently, few cases decided under the two equity skimming statutes. The lower courts now face them frequently. Since 1986, there have been six reported appellate decisions, including this case. *See Capano; United States v. Aubrey*, 878 F.2d 825 (5th Cir. 1989); *United States v. Haines*, 855 F.2d 199 (5th Cir. 1988); *United States v. Spars*, 848 F.2d 890 (8th Cir. 1988); *United States v. Bernloehr*, 833 F.2d 749 (8th Cir. 1987) (all decided under 12 U.S.C. § 1709-2). In light of the increasing use of the statute, a definitive determination of the elements of the offense is necessary.

2. *Section 1709-2 is ambiguous.* If the language of the statute is ambiguous, the rule of lenity comes into play. *See Yermian*, 468 U.S. at 70 n.7. The court below, after

cursory review, concluded that the provision of section 1709-2(1) pertaining to the FHA and VA "unambiguously makes the commission of the act of equity skimming a crime regardless of the defendant's knowledge, or lack of knowledge, that the mortgages on the properties involved are insured by the VA or FHA." 886 F.2d at 1538, App. 11.

Two considerations bolstered, in the court's view, the conclusion that the statute was without ambiguity.[5] First, the court below described the phrase concerning the VA and FHA as "jurisdictional," rather than stating an element of the offense. Second, the panel looked briefly at the sentence in question, and decided that it was susceptible of only one parsing. 886 F.2d at 1538-39, App. 11-14.

Even if the lower court's interpretation of the equity skimming statute is "verbally tenable," it is not "the only meaning the words will bear." *United States v. Marvin*, 687 F.2d 1221, 1226 (8th Cir. 1982), *cert. denied*, 460 U.S. 1081 (1983). The rule of lenity should therefore have been applied.

a. *"Jurisdictional."* For several reasons, the requirement of VA or FHA insurance is not "jurisdictional" as that term has been used in the cases. In fact, the resort by the court below to the label "jurisdictional" is itself misleading, for the proper inquiry is not "whether the

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[5] The scant legislative history is not illuminating. It merely states that the law was "intended to deter the so-called practice of 'equity skimming,' which had resulted in losses to the FHA and VA in the past." 1970 U.S. Code Cong. & Admin. News 5582, 5650.

requirement is jurisdictional, but whether it is jurisdictional *only*." *United States v. Feola*, 420 U.S. 671, 676 n.9 (1975) (emphasis added). Even the panel recognized that Congress could "have made the requirement that the properties be federally insured a substantive part of the offense." 886 F.2d at 1539 n.4, App. 12 n.4.

The broad net cast by the court below takes in far more for the term "jurisdictional" than has previously been assumed. In *Yermian* and *Feola*, the requirement that a federal agency or federal officer be involved is "jurisdictional" in the normal sense of the word. To attach liability to all false statements to, or all assaults upon, state officers might well exceed federal power.

On the other hand, there is direct federal involvement in many more mortgages than are covered by section 1709-2 – loans, for instance, issued by any federally chartered or insured bank, or in which FNMA or GNMA has an interest. "Certainly Congress *could have* proscribed equity skimming on all . . . mortgages over which federal jurisdiction might be exercised." *Capano*, 786 F.2d at 129 (emphasis in the original).

Moreover, under its commerce clause power Congress could presumably make criminal the skimming of equity on *any* mortgage. *See generally Perez v. United States*, 402 U.S. 146, 151-54 (1971) (loan-sharking statute). Far from being an element necessary to create jurisdiction, the reference in section 1709-2 to the FHA and VA narrows the potential scope of the statute.

Both the federal bank robbery statute, 18 U.S.C. § 2113, examined in *United States v. Brown*, 616 F.2d 844 (5th Cir. 1980), and the assault on a federal officer statute, 18 U.S.C. § 111, construed in *Feola*, are – contrary to the

Ninth Circuit's reading – substantially different from the equity skimming statute. The offenses considered in *Brown* and *Feola* are mala in se, stating the common law crimes of robbery and assault. In each case, Congress applied the criminal sanction to a wide sweep of institutions and individuals – in the case of banks, to all federally insured or chartered institutions; in the case of officers, to virtually every federal official.

The equity skimming statute, by contrast, defines a new offense, all of whose aspects become an integral part of the crime itself. Thus, by its carefully selected limitation, Congress may well have intended FHA or VA insurance to be an element of the offense qualified by the requirement of knowledge. The government should have been required to prove as an element of the offense a knowing intrusion on the specific federal domain clearly set out in the statute.

b. *"Ambiguity."* After concluding that the federal insurance aspect of the equity skimming statute is "jurisdictional," the panel looked for the first time at section 1709-2's language. Here again, the equity skimming statute is quite different from the laws construed in *Brown*, *Yermian*, and *Feola*, the cases relied on below.

The bank robbery statute reviewed in *Brown* and relied upon heavily by the government does not require intent with regard to the place of the act. Section 2113(a) prohibits the taking or attempted taking of money or property from a bank, credit union, or savings and loan association, as those terms are defined in sections 2113(f), 2113(g) and 2113(h). No mention is made of knowledge or intent in its first paragraph, but, in its second paragraph,

section 2113(a) prohibits entry or attempted entry into any bank "with the intent to commit in such bank . . . any felony." Thus, to violate section 2113, one need have the intent to commit a felony when entering a bank, but, by the plain meaning of the statute, not the knowledge or intent that the place in which the felony might be committed *be* a bank. The "intent" requirement follows rather than precedes the locational requirement.[6]

The placement of the modifier *after* the federal element underlay the result in *Yermian*. There, the statute provided:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully makes any false, fictitious or fraudulent statements or representations . . . shall be fined. . . .

18 U.S.C. § 1001. The Court found that the placement of the "knowingly and willfully" phrase *after* the reference to the "any department or agency of the United States" made it "clear that Congress did not intend the terms 'knowingly and willfully' to establish the standard of culpability for the jurisdictional element of § 1001." 468 U.S. at 69.

> Any natural reading of § 1001, therefore, establishes that the terms "knowingly and willfully"

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[6] Similarly, § 111, pertaining to assault on a federal officer, contains no explicit reference to intent or knowledge, either before or after its incorporation of 18 U.S.C. § 1114, defining federal officers. In *Feola*, the Court was asked to impose a strict scienter requirement on whether the victim was a federal officer, even though there was no serious claim that the " 'federal officer' requirement is anything other than jurisdictional." 420 U.S. at 676.

> modify only the making of "false, fictitious or fraudulent statements," and not the predicate circumstance that those statements be made in a matter within the jurisdiction of a federal agency. . . . The statute contains no language suggesting any additional element of intent, such as a requirement that false statements be "knowingly made in a matter within federal agency jurisdiction" or "with intent to deceive the Federal Government."

*Id.* Had the syntax of the statute been different, the so-called jurisdictional element could have been subject to the "knowingly and willfully" limitation.[7]

*Brown, Yermian,* and *Feola* therefore support Laykin's contention that the placement of the element within the statute and the statute's ordinary-language interpretation – not a conclusion about whether an element is "jurisdictional" – determines whether that element requires mens rea. These cases demonstrate that the omission of an explicit mens rea requirement, or its placement *after* the element in question, generally means that intent or knowledge will not be required. Conversely, when the mens rea requirement *precedes* an element of the offense, a construction applying it to the subsequent elements is at least reasonable and perhaps mandatory.

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[7] The dissent in *Yermian* argued that, in the absence of clear language about the intended application of the statute, the rule of lenity should apply. 468 U.S. at 77-79 (Rehnquist, J., joined by Brennan, Stevens & O'Connor, JJ., dissenting). There was considerably more legislative history relevant to the interpretation of § 1001 than there is for § 1709-2. Therefore, even apart from the different placement of the mens rea element in the offense, *Yermian* – unlike the court below – was able to rely on documented congressional intent.

The equity skimming statute – like statutes in which knowledge or intent has been held to limit elements otherwise appearing not to require specific intent – places the mens rea element at the very beginning of the statute. For example, in *Liparota v. United States*, 471 U.S. 419 (1984), which reversed a conviction for misuse of food stamps, the key provision penalized anyone who "knowingly uses, transfers, acquires, alters, or possesses coupons or authorizations cards in any manner not authorized by the regulations." 7 U.S.C. § 2024(b)(1). Knowledge of the law is not usually an element of an offense, and the sentence could have been read so that the adverb "knowingly" modified the series of verbs that followed (and not the prepositional phrase). The Court held, however, that "either interpretation" – having "knowingly" modify the "in any manner" phrase or requiring no knowledge of the law – "would accord with ordinary usage." *Liparota*, 471 U.S. at 424.

Similarly, in *United States v. Johnson & Towers, Inc.*, 741 F.2d 662 (3d Cir. 1984), the Third Circuit was asked to construe 42 U.S.C. § 6928(d), which imposed criminal penalties upon

> any person who –
>
> . . .
>
> (2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter either –
>
> (A) without having obtained a permit under section 6925 of this title . . . or
>
> (B) in knowing violation of any material condition or requirement of such permit.

The Third Circuit found the precedent "knowingly" applied to all elements of the offense, including failure to have a license. 741 F.2d at 668. It did so even though the word "knowing" was repeated in section 6928(d)(2)(B), leading to the possible interpretation that "knowingly" modified only the words in the phrase where it appeared, and did not apply to either subsection (A) or (B). 741 F.2d at 668. *See also United States v. Marvin*, 687 F.2d 1221, 1226 (8th Cir. 1982) ("knowingly" held to modify all subsequent elements of 7 U.S.C. § 2024(b)), *cert. denied*, 460 U.S. 1081 (1983).

Finally, the decision below sharply conflicts with *United States v. Nofziger*, 878 F.2d 442 (D.C. Cir.), *cert. denied*, 110 S. Ct. 564 (1989), despite the lower court's assertion to the contrary. *See* 886 F.2d at 1539 n.5, App. 12-13. In *Nofziger*, the word "knowingly," appearing at the beginning of a provision of the Ethics in Government Act was held to apply to what might well have been described as a "factor that makes [influence peddling] an appropriate subject for federal concern." Under the statute, a covered federal employee is a felon if he,

> within one year after such employment has ceased, knowingly acts as an agent or attorney for, or otherwise represents, anyone other than the United States in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communications on behalf of anyone other than the United States, to –
>
> (1) the agency in which he served, or any officer or employee thereof, and
>
> (2) in connection with any . . . particular matter, and

> (3) in which the agency has a direct and substantial interest. . . .

18 U.S.C. § 207(c). Despite the fact that the word "knowingly" is "set off in a separate clause from the rest of the language," *see Laykin*, 886 F.2d at 1539, App.13, and despite the intervening language about intent, *Nofziger*, 878 F.2d at 450, "knowingly" was held to modify the balance of the statute.

Moreover, even if the placement of commas in a statute should determine the applicability of the criminal sanction, and, further, agreeing arguendo with the court below that Congress isolated by means of commas the phrase, "intent to defraud," should not the congressional determination *not* to set off the word "willfully" with commas be equally a reflection of legislative intent that "willfully" modify all that follows?

Laykin does not contend that the congressional intent in section 1709-2 is crystal-clear. Indeed, the sparse legislative history provides no significant additional insight into the elements Congress intended for the statute. What is clear is that the Ninth Circuit's one-paragraph grammatical analysis does not provide the only reasonable interpretation of section 1709-2.

If anything, the effort below to explain why the meaning of § 1709-2 is clear proves the ambiguity of the statute. To explain its point that the federal insurance element is separate, the decision below must set off with a comma the phrase "and that the houses must be insured by the federal government," and must add to it the qualifier, "in addition." 886 F.2d at 1539, App. 13.

It is precisely the ambiguity that pervades the statute that required the court below to rewrite it. That ambiguity should be resolved in petitioner's favor under the rule of lenity.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

ROBERT C. MOEST
*Counsel of Record*
DAVID GROSZ
FLEISHMAN, FISHER, & MOEST
2049 Century Park East
Suite 3160
Los Angeles, California 90067
(213) 557-1077

**APPENDIX A**

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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|---|---|
| UNITED STATES OF AMERICA,<br>*Plaintiff-Appellee,*<br>v.<br>MICHAEL ROBERT LAYKIN,<br>*Defendant-Appellant.* | No. 88-1326<br>D.C. No.<br>CV-S-87-10-HDM |
| UNITED STATES OF AMERICA,<br>*Plaintiff-Appellee,*<br>v.<br>DENNIS LEE CRAIN,<br>*Defendant-Appellant.* | No. 88-1327<br>D.C. No.<br>CV-S-87-10-HDM<br>OPINION |

Appeal from the United States District Court
for the District of Nevada
Howard D. McKibben, District Judge, Presiding

Argued and Submitted
June 29, 1989 – San Francisco, California

Filed September 26, 1989

Before: Thomas Tang, Stephen Reinhardt and
Charles Wiggins, Circuit Judges.

Opinion by Judge Reinhardt

## SUMMARY

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### Criminal Law

Affirming the district court's judgment of conviction, the court held that 12 U.S.C. § 1709-2(1980) makes equity skimming a crime regardless of defendant's knowledge or lack of knowledge that mortgages on the properties involved are VA or FHA issued or insured.

T.L. Corporation, of which appellant Michael Laykin was president, secretary, and treasurer, purchased over 100 homes. Appellee Dennis Crain, the principal agent for identifying properties for purchase, and Laykin negotiated most of the purchases. T.L. Corporation bought homes with existing mortgages and simply agreed to make the payments. If the seller had any equity, T.L. would give him a note for the amount of equity, secured by a deed of trust and providing for monthly interest payments and a balloon payment at the end of a term of years. The purchases were negotiated through an unusual escrow arrangement which precluded the giving of notification of the mortgage lenders that T.L. had purchased them. After a purchase, Century 21 managed it, but was not permitted to pay the mortgage. It was required to turn over the remaining funds to T.L. or to Laykin personally. When former owners began complaining that they were receiving notices from their mortgage lenders that payment had not been made, Century 21 refused to manage T.L.'s property. Crain then located another rental agent, PM Corporation, to manage the properties with specific instructions to deposit the excess rental payments into its own account and send money to various travel

agents, accountants, and lawyers, as well as to write a large number of checks directly to Laykin and Crain. PM Corporation soon began to receive the same complaints about nonpayment of mortgages and eventually resigned as rental agent. By the winter of 1985, most of the homes were in foreclosure, six of which were issued or guaranteed by the Veterans Administration or the Federal Housing Administration. Laykin and Crain were indicted and convicted of equity skimming and conspiracy to commit equity skimming. Both appealed.

**[1]** Laykin argued that 12 U.S.C. § 1709-2 is ambiguous as to whether an individual charged with a violation must know that a federal agency is involved and must intend to defraud that federal agency. He argued that the rule of lenity is applicable and that the statute must be construed in favor of the defendant. **[2]** However, a court is not always required to use the rule of lenity when interpreting a criminal statute. The rule does not apply when the statute is unambiguous. The rule is not to be used to defeat congress' intent in creating a federal crime. **[3]** On its face, the statute does not require knowledge that the mortgages on the properties are FHA or VA insured or issued. There appears to be no reason that it should. Its primary purpose is to establish federal jurisdiction, and because the statutory language at issue is jurisdictional, scienter is not required. **[4]** Because there is no ambiguity in the statute, the rule of lenity is inapplicable. Laykin's contention that the indictment and the jury instructions were defective because they did not include the requirements of knowledge and intent is rejected. **[5]** The government presented more than enough evidence from which a reasonable jury could conclude that Laykin

and Crain each had the specific intent to defraud. It is axiomatic that intent can be inferred from conduct. Both negotiated the particular parts of the deal which permitted them to skim off the rental payments. [6] Their specific involvement in the organization of the transactions laid a sufficient foundation from which the jury could reasonably infer the requisite intent. [7] Crain's contention that there was insufficient evidence that he had entered into and knowingly participated in a conspiracy to engage in equity skimming was without merit. The government presented ample evidence that there was a conspiracy. [8] Only a slight connection with the conspiracy is necessary to convict a defendant of knowing participation in it. [9] Laykin argued that the indictment in which he was charged was fatally defective because it is imprecise as to the time of the conspiracy. [10] The indictment contains a list of 18 overt acts that serve as a basis for limiting the time frame of the indictment and give defendants notice of the scope of charges against them. Sufficient information was provided for the defendants to prepare an adequate defense.

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## COUNSEL

Robert C. Moest, Los Angeles, California, for the defendant-appellant Laykin.

James E. Guesman, Las Vegas, Nevada, for the defendant-appellant Crain.

Paul Ernest Wommer, Las Vegas, Nevada, for the plaintiff-appellee.

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## OPINION

REINHARDT, Circuit Judge:

Michael Laykin and Dennis Crain appeal from their convictions following a jury trial on one count of equity skimming in violation of 12 U.S.C. § 1709-2(1980), and one count of conspiracy to commit equity skimming. We affirm.

### *STATEMENT OF FACTS*

The T.L. Corporation was incorporated on June 28, 1985. Robert Terry was the principal incorporator and the "T" in T.L. Corporation; Laykin was the president, secretary and treasurer of the company and the "L". In the summer following the incorporation of T.L. Corporation, the company began to seek and acquire single-family homes in the Las Vegas area. Using the Century 21 office owned by Robert Terry and the services of Crain, an independent agent operating from the office, T.L. Corporation purchased over 100 homes. Crain was the principal agent for identifying properties for purchase and Laykin negotiated most of the purchases.

T.L. Corporation utilized essentially the same technique for effecting each purchase. In general, it bought homes with existing mortgages and simply agreed to make the payments. If the seller had any equity in the property, the corporation would give him a note for the amount of the equity, secured by a deed of trust. The note provided for monthly interest payments and a balloon payment of the capital at the end of a term of years. To this point, there was nothing particularly unique about

the purchase method. However, the purchases were negotiated through an unusual escrow account arrangement which precluded the giving of notification to the mortgage lenders that the properties were being sold or that T.L. Corporation had purchased them.

After T.L. Corporation purchased a property, Laykin arranged for Century 21 to manage it. Century 21 collected the rents and deducted both a 10% fee and the funds necessary to maintain a reasonable upkeep of the property. However, Century 21 was not permitted to pay the mortgage. It was required to turn over the remaining funds to T.L. Corporation or to Laykin personally. Whatever purpose the funds were put to, it is abundantly clear that they were not used to pay off the existing mortgage.

Beginning as early as August, 1985, the former homeowners began to call the rental office, complaining that they were receiving notices from their mortgage lenders that payment had not been made on their mortgages. Because T.L. Corporation never assumed any of the mortgages, the lenders informed the former owners that they were still liable on those debts. Century 21 told Laykin of the complaints. Nevertheless, neither Laykin nor T.L. Corporation made the mortgage payments. Because of all of the complaints, Century 21 refused to manage T.L. Corporation's properties after October 1985.

Crain then located another rental agent, the PM Corporation, to manage the properties. However, PM Corporation operated under somewhat different instructions than did Century 21. Instead of remitting the excess rental payments directly to Laykin, PM Corporation deposited the money into its own trust account. Subsequently,

Laykin would instruct the rental agents to send funds to various travel agents, accountants, and lawyers, among others. Laykin also instructed the rental agents to write a large number of checks directly to him or to companies he controlled. These checks totalled approximately $9000. Laykin also directed that four checks totalling $2,000 be issued to Crain.

Soon, however, PM Corporation began to receive the same complaints about nonpayment of mortgages as did Century 21 and eventually resigned as the rental agent. By the winter of 1985, most of the homes owned by T.L. Corporation were in foreclosure proceedings. The six properties named in the indictment had mortgages that were either issued or guaranteed by either the Veterans Administration (VA) or the Federal Housing Administration (FHA).[1] The mortgages on these six properties eventually went into default and then foreclosure, resulting in a loss of over $100,000 to the government.

On January 21, 1987, Laykin and Crain were each indicted and charged with one count of equity skimming in violation of 12 U.S.C. § 1709-2(1980), and one count of conspiracy to commit equity skimming.[2] Equity skimming is defined as the practice of purchasing one-to-four family dwellings subject to a loan insured by either the

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[1] Contrary to the government's assertion at oral argument, the record does not indicate whether any of the other properties purchased by T.L. Corporation had mortgages that were either insured or issued by one of these government agencies.

[2] T.L. Corporation was also indicted on these same two counts, but was eventually dismissed as a defendant.

FHA or the VA and applying the rent receipts for personal gain rather than towards payment of the mortgages. *See* H. Rep. No. 91-1556, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Cong. & Admin. News 5582, 5650.

At trial, the government argued that the foreclosures were the planned result of a scheme to skim off the profits of the housing venture and avoid payment of the mortgages in violation of Section 1709-2. The defendants contended that the losses were the unfortunate result of erroneous predictions about the Las Vegas housing market. The jury chose to believe the government and convicted the defendants on both counts of the indictment. Laykin was sentenced to five years in prison, with a substantial portion of the sentence suspended on the condition that he serve six months in jail and perform three hundred hours of community service. Crain was likewise sentenced to five years imprisonment with his sentence suspended on the condition that he serve ninety days in jail and perform two hundred and fifty hours of community service. Appellants were also jointly ordered to pay restitution of approximately $97,000 to the VA and the FHA. This appeal followed.[3]

## *ANALYSIS*

### *I*

As an initial matter, Laykin argues that the indictment charging him with equity skimming is fatally defective because it does not affirmatively allege that he knew or should have known that the properties were insured

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[3] Laykin and Crain are free on bail pending appeal.

by FHA or the VA and that he acted with the intent to defraud those insurers. He also contends that the jury instructions given by the district court were defective for the same reason.

**[1]** 12 U.S.C. § 1709-2 provides, in pertinent part, that

> Whoever, with intent to defraud, willfully engages in a pattern or practice of –
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> (1) purchasing one- to four-family dwellings . . . secured by a mortgage or deed or trust insured or held by the Secretary of Housing and Urban Development or guaranteed by the Veterans' Administration, or the loan is made by the Veterans' Administration,
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> (2) failing to make payments under the mortgage or deed of trust as the payments become due, regardless of whether the purchaser is obligated on the loan, and
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> (3) applying or authorizing the application of rents from such dwellings for his own use . . . shall be fined not more that [sic] $5,000 or imprisoned not more than three years, or both.

Laykin argues that the statute is ambiguous as to whether an individual charged with a violation must know that a federal agency is the insurer and must intend to defraud that federal agency. Therefore, he argues, the rule of lenity is applicable and the statute must be construed in favor of the defendant. In *United States v. Capano*, 786 F.2d 122 (3d Cir. 1986), the Third Circuit construed the equity skimming provisions of 12 U.S.C. § 1715z-4b, which prohibits equity skimming from federally assisted multiple family housing projects. The court concluded that the

language of the statute was ambiguous as to whether a violation could occur if the debtor had not received an extension of time in which to cure any default or obtain a modification of the mortgage terms. After examining the structure of the statute, as well as its legislative history, the court determined that the statute did not apply if the debtor had not received the extension. *Id.* at 125-27. Although the court could have ended its inquiry at this point and based its decision simply on general principles of statutory interpretation, the court bolstered its conclusion by looking to the rule of lenity. "It is well-settled that where a court's interpretative effort fails to eliminate ambiguity in the meaning of a criminal statute, [and this statute is at best ambiguous], the residual uncertainty will be resolved in favor of lenity." *Id.* at 128.

On the other hand, in *United States v. Yermian,* 468 U.S. 63 (1984), the Supreme Court held the rule of lenity inapplicable when interpreting a statute it found to be unambiguous. The Court was construing the Federal False Statements Act, 18 U.S.C. § 1001, which provides in pertinent part:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes any false, fictitious or fraudulent statements or representations . . . shall be fined. . . ." The Court held that the statutory language did not require any specific knowledge on the part of the defendant that his statements were made in a matter within the jurisdiction of a federal agency. 468 U.S. at 75. In reaching its conclusion, the Court first considered the language of the statute and its structure and decided that the statute "unambiguously dispenses with any requirement that

> the Government . . . prove that [the false] statements were made with actual knowledge of federal agency jurisdiction." *Id.* at 69-70. Because the statute was not ambiguous, the Court refused to apply the rule of lenity. *Id.* at 70 n.7.

**[2]** As *Yermian* and *Capano* demonstrate, a court is not, as Laykin contends, always required to use the rule of lenity when interpreting a criminal statute. To put it simply, the rule does not apply when the statute is unambiguous. *See Lewis v. United States*, 445 U.S. 55, 65 (1980). The rule of lenity is not to be used to defeat Congress' intent in creating a federal crime. *Capano*, 786 F.2d at 128 (citing *United States v. Turkette*, 452 U.S. 576, 586-87 & n.10 (1981)). Accordingly, our task is to examine the statute to determine whether it is in fact ambiguous.

**[3]** Although neither the appellant nor the government has engaged in close analysis of the language of Section 1709-2, we conclude that the statute unambiguously makes the commission of the act of equity skimming a crime regardless of the defendant's knowledge, or lack of knowledge, that the mortgages on the properties involved are insured by the VA or FHA. On its face, the statute does not require such knowledge; and there appears to be no reason that it should. The requirement in Section 1709-2 that the properties be insured by a government agency plays the same role as does the requirement in the Federal False Statement Act that the statement be made in a matter within the jurisdiction of a United States department or agency: it establishes federal jurisdiction. "Its primary purpose is to identify the factor that makes [equity skimming] an appropriate subject for federal concern." *Yermian*, 468 U.S. at 68; *see also United States v. Feola*, 420 U.S. 671, 676-77 & n.9 (1975) (no

requirement in 18 U.S.C. § 111, which prohibits assaults on federal officers, that defendant know that individual is a federal officer; requirement is jurisdictional); *United States v. Brown*, 616 F.2d 844, 845-46 (5th Cir. 1980) (requirement in 18 U.S.C. § 2113 that bank be federally insured or chartered is jurisdictional). Because the statutory language at issue is jurisdictional, scienter is not required.[4] "Jurisdictional language need not contain the same culpability requirement as other elements of the offense. Indeed, we have held that 'the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute.' " *Yermian*, 468 U.S. at 69-70 (quoting *United States v. Feola*, 420 U.S. 671, 676-77 n.9 (1975)).[5]

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[4] Of course, we do not mean to intimate that Congress could not have made the requirement that the properties be federally insured a substantive part of the offense. *See Feola*, 420 U.S. at 677 n.9. It could have done so by ending the statute in such a way that knowledge of the federal insurance was required. In that case, the defendant would have to know that the properties were federally insured in order for there to be a violation of the statute. But, as our analysis indicates, that is not the statute that Congress has enacted.

[5] The fact that the federal insurance requirement is jurisdictional distinguishes our case from *United States v. Nofziger*, No. 88-3058, (D.C. Cir. 1989). In that case, the court considered subsection 207(c) of the Ethics in Government Act, 18 U.S.C. § 207(c). The question in that case was whether the modifying term "knowingly" applied to both the "appearance clause" and "communication clause" of the sentence of which it was a part, or whether it applied only to the first clause. Slip op. at 4. After

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The structure of the statute plays a part in our conclusion that the knowledge requirement of 12 U.S.C. § 1709-2 does not apply to the federal insurance aspect of the offense. The two phrases connoting knowledge, intent and willfulness, are set off from the language that provides the loans be made, guaranteed or held by a federal agency. The phrase "intent to defraud" is set off in a separate clause from the rest of the language. Its isolation suggests that Congress intended only for a specific intent to defraud, not for a specific intent to defraud an agency of the United States government. Moreover, the term "willfully" is part of a disjunctive sentence. The natural reading of the sentence is that the defendant must willfully participate in a pattern of purchasing one- to four-family dwellings *and*, in addition, that the houses must be insured by the federal government. The final clause is a separate component not modified by a knowledge requirement. *See Yermian*, 468 U.S. at 69.

**[4]** Because we find no ambiguity in the statute, we conclude that the rule of lenity is inapplicable. We hold that the language of 12 U.S.C. § 1709-2 does not require that a defendant know (or should know) that properties are insured by the FHA or the VA; nor does it require that he act with the intent to defraud those federal insurers. Thus, we reject Laykin's contention that the indictment

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finding the statute to be ambiguous, the court concluded that it applied to both clauses. *Id.* at 27. This conclusion was based in no small part on the fact that both clauses were substantive offenses. *Id.* at 22-27.

and the jury instructions were defective because they did not include these requirements.

*II*

Laykin and Crain make numerous challenges to the sufficiency of the evidence adduced at trial. As always, we review such challenges to see whether, viewing the evidence in the light most favorable to the government, the jury could reasonably have found the essential elements of the crime beyond a reasonable doubt. *United States v. Fleishman*, 684 F.2d 1329, 1340 (9th Cir.), *cert. denied*, 459 U.S. 1044 (1982). All reasonable inferences must be drawn in favor of the government and any conflicts in the evidence must be resolved in favor of the jury's decision. *Id.*

Both Laykin and Crain contend that there was insufficient evidence presented at trial for the jury to conclude beyond a reasonable doubt that either had the specific intent to defraud.[6] Consequently, they contend that the trial court erred in denying their motions for acquittal pursuant to Federal Rule of Criminal Procedure 29.

**[5]** We believe that the government presented more than enough evidence from which a reasonable jury could conclude that Laykin and Crain each had the specific intent to defraud. It is axiomatic that intent can be inferred from conduct. *United States v. Brecroft*, 608 F.2d 753, 757 (9th Cir. 1978). Here, several witnesses testified to the

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[6] This claim is different than Laykin's argument that intent to defraud the government is an element of the substantive offense. That theory is analyzed in part I, *supra*.

active involvement of both appellants in purchasing the properties.[7] While, as Crain contends, negotiating the purchase of property alone is not particularly probative of an intent to defraud, both Laykin and Crain negotiated the particular parts of the deal – including the special escrow instructions – which permitted the defendants to skim off the rental payments. Both were involved in coordinating the signing of the blind escrow accounts which were crucial to the success of the scheme. The jury could probably have inferred intent to defraud from this highly unusual practice alone.

**[6]** The government, however, presented much additional evidence which strengthened the inference of an intent to defraud. Once the former property owners began to complain to the rental agent that mortgage payments were not being made, Laykin assured the rental agent that they would be. When an escrow officer began to warn potential customers of the hazards involved with the type of deal that Laykin and Crain were arranging, Crain, apparently at the direction of Laykin, threatened her and ordered her to cease disclosing the nature of the transactions. The appellants' specific involvement in the organization of the transactions – especially the escrow accounts, the threats to the escrow officer by Crain, and Laykin's unfulfilled promises that the mortgage payments would be made – lay a sufficient foundation from which the jury could reasonably infer the requisite intent.

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[7] While Laykin negotiated the purchase of most of the properties acquired by T.L. Corporation, at least two individual homeowners testified that Crain negotiated the sale of their homes.

[7] Crain contends that there was insufficient evidence from which the jury could conclude that he had entered into and knowingly participated in a conspiracy to engage in equity skimming. That contention is without merit. The government presented ample evidence that there was a conspiracy. The testimony of the Century 21 office manager established that Terry, Laykin, and Crain agreed that a special telephone line at Century 21's office would be for the sole use of T.L. Corporation in acquiring residential property in Las Vegas. Crain was in charge of screening all calls on that line. From this, the use of the unusual escrow instructions which prevented the VA and FHA from learning of the sales of the properties, and the lack of any effort to fulfill the mortgage agreements, a jury could rightfully infer the existence of a conspiracy to engage in equity skimming.

[8] "Once the government has established that a conspiracy exists, 'evidence of only a slight connection [with the conspiracy] is necessary to convict a defendant of knowing participation in it.' " *United States v. Arbelaez*, 719 F.2d 1453, 1458 (9th Cir. 1983) (quoting *United States v. Kenney*, 645 F.2d 1323, 1335 (9th Cir.), *cert. denied*, 452 U.S. 920), *cert. denied*, 467 U.S. 1255 (1984). Here, Crain's intimate participation in the details of the activity affords a reasonable basis for the jury's conclusion that he was a knowing participant.[8]

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[8] It is clear that a defendant need not participate in all parts of the conspiracy in order to be a part of it. *United States v. Taylor*, 802 F.2d 1108 (9th Cir. 1986). Consequently, the fact that Crain did not direct the disbursal of funds does not preclude the jury's verdict on the conspiracy charge.

Next, both Laykin and Crain argue that there was insufficient evidence to prove that they were engaged in a pattern or practice of purchasing federally-insured homes and applying or authorizing the use of the rental payments for their own benefit, as required by the statute. This argument has two parts. First, the appellants assert that the government failed to establish that any of the funds they received had in fact been "skimmed" from the rental payments on the six properties specified in the indictment. Second, they contend that the government failed to show that any of those funds, if skimmed, were applied to their personal use.

To determine the answer to the appellants' first contention, we must look to the source of the funds issued to them by the rental management companies. The government in its brief has not identified any funds that were issued to Laykin or Crain while Century 21 was managing T.L. Corporation's properties. Rather, it points to evidence that, while PM Management was managing T.L. Corporation's extensive property holdings, PM Management issued checks in the amount of approximately $9000 to Laykin, while Crain received four checks in the total amount of $2000. In addition, the government also presented evidence that Laykin directed PM Corporation to issue checks to numerous other entities.

The problem in determining whether the monies paid to Laykin and Crain were in fact skimmed in violation of the provisions of the Act arises from the fact that the rental payments from the six federally-insured properties specified in the indictment were commingled with rental payments from T.L. Corporation's other property holdings, approximately 100 in number. The government's

assertion at oral argument notwithstanding, the record does not indicate whether any of the other properties were also federally-insured. Thus, while it is clear that the trust account from which the checks to Laykin and Crain were issued contained tainted, i.e., skimmed, funds, it is also clear on this record that most of the funds in the account were untainted.

However, we do not think the gap in the record renders the convictions invalid. Generally, when tainted and untainted funds are commingled in an account, and withdrawals are subsequently made, a proportionate share of those withdrawals will be allocated to the tainted funds.[9] *See* Restatement (Second) of Trusts § 202(1), comment i (1959) (commingling by trustee of trust and personal funds); *see generally United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1159-60 (2d Cir. 1986) (tracing proceeds from narcotics transactions). Because of Section 1709-2, Laykin and Crain were essentially trustees of the rental payments from the properties set forth in the indictment. We believe that the Restatement allocation rule is an appropriate one to apply here. Accordingly, from the evidence presented by the government, the jury could reasonably conclude that at least part of the monies the appellants received from the commingled account came from the rental payments on the federally-insured properties.

The second part of the appellants' argument is that the government failed to establish that either of them

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[9] The share is established by determining the ratio of the tainted funds to the untainted funds in the account.

ever used any of the skimmed funds for his own personal purposes. Laykin argues that the government never rebutted his claim that the funds he received were to reimburse him for business expenses incurred when flying from Beverly Hills to Las Vegas to complete the escrow agreements; Crain argues simply that the government never showed what he did with the funds he received. It is true that the government was unable to trace what happened to the funds after the rental agent presented the checks to Laykin or his agents, or to Crain. However, given the fungibility of money, which makes tracing of the use of specific funds difficult, if not impossible, and far more important, given the fact that no evidence was offered that any restrictions were placed on the defendant's [sic] use of funds that they personally received, we believe that the jury could reasonably infer from the record before it – including of course the fact that the funds were not used to pay any of the mortgages – that Laykin and Crain received the money for their own personal use. That, in our view, is sufficient to support a violation of § 1709-2.[10] We do not mean to suggest that the jury could have drawn no other inference from the evidence. Rather, we hold that, given our deferential standard of review, we cannot say that the jury could not have reached the conclusion it did.

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[10] For present purposes, we can ignore the fact that some of the funds were paid to companies controlled by Laykin rather than to Laykin personally and look just to the funds falling into the latter category. We doubt, however, that the result would be different were we required to consider the former category of payments as well.

*III*

**[9]** Laykin argues that the indictment in which he was charged is fatally defective because it is imprecise as to the time of the conspiracy. The indictment reads, "Beginning on a date unknown to the Grand Jury, but not later than on or about March 1, 1985, and continuously thereafter and including on or about October 14, 1986 . . . ." Relying on *United States v. Cecil*, 608 F.2d 1294, 1296-97 (9th Cir. 1979), Laykin argues that the use of "on or before" to set the time limit of the conspiracy is sufficiently vague to render the indictment invalid. The government argues in rebuttal that any error in the indictment is irrelevant because time is not a material element of either the conspiracy or equity skimming charges. Thus, the government argues, any variance between the indictment and the proof at trial cannot constitute reversible error. *See United States v. Davis*, 679 F.2d 845 (11th Cir. 1982).

**[10]** The common thread which connects *Cecil* and *Davis* is that the indictment must sufficiently notify the defendant of the charges against him and enable him to prepare a defense. "[A]n indictment must furnish the defendant with a sufficient description of the charges against him to enable him to prepare his defenses, to ensure that the defendant is prosecuted on the basis of facts presented to the grand jury, to enable him to plead jeopardy against a later prosecution, and to inform the court of the facts alleged so that it can determine the sufficiency of the charge." *Cecil*, 608 F.2d at 1296. Appellant is correct in noting that the dates specified in the indictment here do not give an adequate basis for ascertaining the charges against him; as in *Cecil*, the language

of the indictment is open-ended in both directions. The beginning date tells the defendants nothing – just that the conspiracy started at some time before a particular date. The ending date is in all likelihood just inartfully stated: "*including* on or about October 14, 1986" (emphasis added) was undoubtedly intended to refer to the closing date. Unfortunately, as presented, the indictment merely states that the conspiracy did not end prior to October 14, 1986. However, unlike *Cecil*, the overt acts alleged in the indictment before us provide a narrowing focus. The indictment contains a list of 18 overt acts that serve as a basis for limiting the time frame covered by the indictment and giving the defendants notice of the scope of the charges against them. The acts occurred in a discrete time period between January 15, 1985 and July 14, 1986 and provide sufficient information for the defendant to prepare an adequate defense. Accordingly, we conclude that the uncertainty regarding beginning and ending dates does not render the indictment fatally defective.

*IV*

Laykin also argues that the government did not introduce sufficient evidence to support a finding beyond a reasonable doubt that a conspiracy existed on or about March 1, 1985. He contends that the earliest date that can be derived from the evidence adduced at trial is June 28, the date of the incorporation of T.L. Corporation. Laykin argues that any conspiracy to violate Section 1709-2 could not have been formulated until July because he was originally interested in purchasing only large apartment complexes, not one- to four-family dwellings as required by the statute.

In response, the government advances two arguments. We need only address one of them. The government argues that because time is not a material element of the conspiracy, any variance in the proof adduced at trial with respect to the starting date of the conspiracy that is within the confines of the due process clause[11] does not constitute reversible error. We agree. Rule 52(a) of the Federal Rules of Criminal Procedure states that any variance that does not affect substantial rights should be disregarded by the court. Time is a material element of an offense only if made so by statute. *See, e.g., United States v. DeBrouse*, 652 F.2d 383, 391 (4th Cir. 1981). Here, because the statute does not make time a material element, the variance between proof and indictment is irrelevant so long as the defendants were afforded adequate notice of the charges against them. As we have already discussed, the indictment was adequate for that purpose. Accordingly, we hold that the variance between the indictment and the proof adduced at trial with regard to the beginning date of the conspiracy is immaterial.

*V*

Laykin further argues that the district court erred in admitting evidence of another equity skimming conspiracy. Prior to and contemporaneous with the conspiracy alleged in the grand jury indictment, another group in Las Vegas, the B & G Corporation, was engaged in a similar equity skimming operation in violation of Section 1709-2. Although the B & G Corporation conspiracy was

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[11] *See supra* § III.

separate from the one at issue in this case, the operations of B & G Corporation and T.L. Corporation were linked in a very limited manner: two of the six houses specified in the indictment were purchased by T.L. Corporation from B & G Corporation.[12]

The main figures in the B & G Corporation conspiracy were Robert Leven and Glenn Goodale. Indictments were returned against them on January 21, 1987.[13] Goodale and Leven eventually pleaded guilty to those charges and then appeared as government witnesses in this case. They testified to a wide range of issues, many extending beyond the limited confines of this case. For example, Goodale and Leven both extensively described the nature of the B & G Corporation operation and their method for skimming equity.

The government contends that the admission of this evidence was proper. It relies on *United States v. L'Hoste*, 609 F.2d 796 (5th Cir. 1980), to argue that proof of multiple conspiracies does not constitute a fatal variance from the indictment. *See also Kotteakos v. United States*, 328 U.S. 750 (1946). However, these cases are not on point. They merely define the rules for determining when proof of

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[12] T.L. Corporation purchased a total of 38 houses from B & G Corporation.

[13] Not coincidently, indictments were handed down in this case on the same day. Laykin suggests that the indictments in this case are tainted because of the confusing identities of the two conspiracies and therefor [sic] are defective. However, appellant presents no authority to support his position and proper respect for grand jury proceedings precludes us from adopting it.

multiple interlinked conspiracies violates the substantial rights of a defendant charged with only a single conspiracy. Here, there were no interlinked conspiracies. The two conspiracies were "related" only in the very limited sense that there was an occasional business transaction between them; there certainly was no common actor or plan between them. Because the B & G Corporation conspiracy was substantially unrelated to the conspiracy alleged in the indictment in this case, the question is not one of variance and proof, but of relevancy. More specifically, the question is whether the admission of significant details of the Goodale and Leven conspiracy prejudiced the defendants and confused the jurors.

It is clear that the details about the B & G Corporation conspiracy were largely irrelevant to the government's case, and the substantial similarities between the dates and activities of the two equity skimming conspiracies and the type of equity skimming taking place raise a strong possibility that the jurors would confuse the conspiracies and infer the guilt of the defendants from the pleas of the B & G Corporation defendants. However, the vast majority of the evidence which Laykin now complains of was admitted at trial without objection by defense counsel. Indeed, much of the evidence to which Laykin did ultimately object had already been admitted without a contemporaneous objection earlier in the proceedings. Moreover, the trial judge gave a very strong, contemporaneous limiting instruction when the defense finally made its objections. The instruction informed the jury that the fact that Leven and Goodale had pleaded guilty to similar equity skimming charges was irrelevant

to the question of the defendants' guilt here.[14] The trial judge also instructed the jury that, while they could consider the details of the purchase by T.L. Corporation from B & G Corporation of two properties which were specified in the indictment, they could not consider any of the other details of the B & G Corporation conspiracy.

While "limiting instructions are not always sufficient to cure the effect of potential prejudice [of improperly admitted evidence]," *United States v. Miller*, 874 F.2d 1255, 1263 (9th Cir. 1989), it is usually "presumed that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it." *Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987); *see also United States v. Charmley*, 764 F.2d 675, 677 (9th Cir. 1985). Equally important, the trial judge in this case explicitly asked both defense counsel and the prosecutor whether his limiting instruction was satisfactory; all responded unequivocally that it was. Moreover, as we have already noted, most of the testimony about the B & G Corporation conspiracy was admitted into evidence without objection, and the plain error rule is therefore applicable. It is also relevant that the prosecutor did not refer to Goodale and Leven's testimony in his closing argument. Under all of these circumstances, we conclude that the trial judge's limiting instruction rendered harmless his error in admitting the irrelevant testimony about the B & G Corporation conspiracy.

---

[14] The trial judge properly instructed the members of the jury that they could consider Leven and Goodale's guilty pleas for the limited purpose of deciding how much weight to give to their testimony – in other words, for making credibility determinations.

*VI*

Finally, Laykin argues that the jury instruction on the time limits of the conspiracy created three more errors. The instruction given by the trial judge to the jury listed the starting date of the conspiracy as January 1, 1985, two months earlier than listed in the indictment. Laykin first argues that this makes the dates of the indictment even more remote than before. However, for the reasons given in Section III, *supra*, we find this argument unpersuasive. Second, Laykin contends that the variance between the jury instruction and the indictment violates his right to have a grand jury return the indictment. However, it is clear that when time is not a material element of the offense, as is the case here, the court may constructively amend the indictment without running afoul of the Fifth Amendment. *Krana v. United States*, 546 F.2d 785, 786 (8th Cir. 1976); *see also United States v. Abascal*, 564 F.2d 821 (9th Cir. 1977). Third, Laykin suggests that the variance between the indictment and jury charge deprived him of the right to a unanimous jury verdict. This contention is equally without merit. The trial judge gave a general instruction to the jury that its verdict had to be unanimous. Because we do not believe that this is a case in which there is a "genuine possibility" that the members of the jury were confused or that Laykin's conviction was the result of "different jurors concluding that the defendant committed different acts," *United States v. Echeverry*, 698 F.2d 375 (9th Cir.), *as modified*, 719 F.2d 974, 975 (9th Cir. 1983), we conclude that the trial judge's instruction was sufficient to secure the defendant's right to a unanimous jury verdict. *See, e.g., United States v. Ferris*, 719 F.2d

1405 (9th Cir. 1983); *United States v. Friedman*, 445 F.2d 1076 (9th Cir. 1971).

*CONCLUSION*

For the above reasons above, we affirm the appellants' convictions on both counts of the indictment.

**AFFIRMED**

## APPENDIX B

U.S. District Court, District of Nevada

*U.S. v. Laykin, Crain*, No. C.V.-S-87-10-HDM

Excerpt of Proceedings, May 18, 1988

(p. 2) PROCEEDINGS BEGIN AT 9:30 A.M.

THE CLERK: Criminal 87-10, United States of America versus Michael Robert Laykin and Dennis Lee Crain. Defendant Laykin is present with counsel, W. Michael Mayock. Defendant Crain is present with counsel Mr. James Guesman. Mr. Paul Wommer is present for the Government. Your Honor, these matters are before the Court for sentencing on the verdict of guilty to both Counts I and II as to both defendants Laykin and Crain.

THE COURT: All right. Fine. I'll consider the case United States versus Michael Laykin, first. Do you have the file there? There is on file a motion for judgment of acquittal and alternatively a new trial. I have considered that, there are several issues that are set forth. I had invited the attention of the parties to – several of – or at least one or two of those issues. I have had the occasion now to review the authorities cited by each of the parties, together with the briefs which have been filed. After consideration of each of those I specifically find that the motion for a judgment of acquittal or alternatively for a new trial should be denied.

I do find that under existing case authority in the Ninth Circuit with respect to the conspiracy that it was properly alleged in connection with the overt acts, that the time period described was not fatally flawed, that the Ninth Circuit has indicated in fairly broad terms, that

what was done in this case (p. 3) would in fact be acceptable.

The defendant did fail to object to one of the instructions that's called into question here. I do not think that that instruction in anyway either mislead [sic] the jury or in the context of the other instructions given was legally impermissible and in any event there was no objection made to that particular instruction which related to the date of the conspiracy.

The other issues which have been raised include the issue which the Court had talked about in connection with the defendant's knowledge that either the VA or FHA insured the mortgages on the subject property and whether or not that's an essential element of the crime of equity skimming. As the Court had suspected in drawing from analogy of other cases which is almost necessary in a case such as this because of the limited number of cases available on this particular statute. It does appear clear that the Court did not error [sic] in connection with those issues. The defendant's knowledge that a federal agency was involved in the matters is not an essential element of the statute – conviction on the statutory sections in question here.

Accordingly for those reasons the Court specifically finds that the motion for a new trial or for a judgment of acquittal should be and hereby is denied. It's denied as to both defendants. All right, we'll proceed with the sentencing now if you'll come forward counsel, Mr. Mayock and Mr. Laykin.

---

## APPENDIX C

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | |
|---|---|
| UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL ROBERT LAYKIN, Defendant-Appellant. | No. 88-1326 D.C. No. CV-S-87-10-HDM ORDER (Filed Dec. 7, 1989) |
| UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DENNIS LEE CRAIN, Defendant-Appellant. | No. 88-1327 D.C. No. CV-S-87-10-HDM |

Appeal from the United States District Court
for the District of Nevada
Howard D. McKibben, District Judge, Presiding

Before: Tang, Reinhardt, and Wiggins, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b). The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

## APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA

V.

MICHAEL ROBERT LAYKIN

(Name and Address of Defendant)

JUDGMENT IN A CRIMINAL CASE

Case Number: CR-S-87-10-HDM (RJJ)

(Received and Filed July 28, 1988)

(Entered July 29, 1988)

W. MICHAEL MAYOCK
Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

[___ guilty ___ nolo contendere] as to count(s) ___, and X not guilty as to count(s) I and II.

THERE WAS A:
[___ finding X verdict] of guilty as to count(s) I and II.

THERE WAS A:
[___ finding ___ verdict] of not guilty as to count(s) ___.
___ judgment of acquittal as to count(s) _____.
The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF:

Conspiracy to violate Title 12, United States Code, Section 1709-2, in violation of Title 18, Section 371 of the United States Code, as charged in count I; equity skimming, in violation of Title 12, Section 1709-2 of the United States Code, as charged in count II; and aiding and abetting, in violation of Title 18, Section 2 of the United States Code, as charged in counts I and II of the indictment.

IT IS THE JUDGMENT OF THIS COURT THAT:

AS TO COUNT I, the defendant be committed to the custody of the Attorney General or his authorized

representative for imprisonment for a period of **FIVE (5) YEARS;** and on condition that the Defendant be confined to a jail type or treatment institution for a period of **SIX (6) MONTHS,** the execution of the remainder of the sentence of imprisonment is suspended and the defendant placed on probation for a period of **FOUR (4) YEARS AND SIX (6) MONTHS.** The probationary term shall commence upon the defendant's release from confinement. AS TO COUNT II, the imposition of sentence as to imprisonment is suspended and the defendant is placed on probation for a period of **FIVE (5) YEARS,** upon the conditions of probation as set forth on page 2 of this order and with **SPECIAL CONDITIONS:** (1) that the defendant make restitution jointly and severally with the co-defendant in the sum of **NINETY-SIX THOUSAND, EIGHT HUNDRED FIFTEEN DOLLARS AND FIFTY CENTS ($96,815.50)** to the United States Secretary of Housing and Urban

CONTINUED ON PAGE 3

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

---

## CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;

(2) associate only with law-abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);

(4) not leave the judicial district without permission of the probation officer;

(5) notify your probation officer immediately of any changes in your place of residence;

(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $100.00 pursuant to Title 18, U.S.C. Section 3013 for count(s) I and II as follows: $50.00 as to each count.

IT IS FURTHER ORDERED THAT counts _____ are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

___ The Court orders commitment to the custody of the Attorney General and recommends:

July 20, 1988
Date of Imposition of Sentence

See page 3
Signature of Judicial Officer

Howard D. McKibben, USDJ
Name and Title of Judicial Officer

See page 3
Date

**RETURN**

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at
Date

_____, the institution designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case.

_____
United States Marshal

By _____
Deputy Marshal

JUDGMENT IN A CRIMINAL CASE
UNITED STATES OF AMERICA vs.
MICHAEL ROBERT LAYKIN
CR-S-87-10-HDM(RJJ)

Page 3

Development or **FORTY-TWO THOUSAND, THIRTY-FOUR DOLLARS AND FIFTY-FIVE CENTS ($42,034.55)** to the Veterans Administration and **FIFTY-FOUR THOUSAND, SEVEN HUNDRED EIGHTY DOLLARS AND NINETY-FIVE CENTS ($54,780.95)** to the Federal Housing Administration; (2) that the defendant perform **THREE HUNDRED (300) HOURS** of community service

as shall be directed by his supervising probation officer; and (3) that the defendant not involve himself in any real estate transactions without the express written permission of his supervising probation officer. The probationary term imposed as to count II is to run concurrently with the probationary term imposed as to count I.

IT IS ORDERED that the execution of the sentence imposed is hereby stayed until **Friday, August 19, 1988, 5:00 o'clock p.m.**, by which time the defendant shall surrender himself to the authorities of the designated institution.

DATED this 25th day of July, 1988.

/s/ Howard D. McKibben
United States District Judge

**APPENDIX E**

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CR-S-87-10-HDM

*ORDER*

UNITED STATES OF AMERICA,

Plaintiff,

v.

DENNIS LEE CRAIN and
MICHAEL ROBERT LAYKIN,

Defendants.

_____/

(Received
April 18, 1988)

(Received and
Filed
April 19, 1988)

(Entered
April 13, 1988)

The Rule 29(c) motions of defendants Dennis Lee Crain and Michael Robert Laykin for a new trial or judgment of acquittal are DENIED.

It is so ORDERED.

DATED THIS 11th day of April, 1988.

/s/ Howard D. McKibben
UNITED STATES
DISTRICT JUDGE

**APPENDIX F**

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

| | | |
|---|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff,<br>v.<br>MICHAEL ROBERT LAYKIN, et al.,<br>Defendants. | ) | CR-S-87-10-PMP<br>*ORDER*<br>(Received and Filed Sept. 10, 1987)<br>(Entered Sept. 11, 1987) |

The Court having read and considered Defendant MICHAEL ROBERT LAYKIN's Motion to Dismiss Indictment (#36), filed September 8, 1987, and good cause appearing,

IT IS ORDERED that Defendant's Motion to Dismiss Indictment (#36) is denied.

DATED: Sept. 10, 1987

/s/ Philip M. Pro
PHILIP M. PRO
United States District Judge

**APPENDIX G**

WILLIAM A. MADDOX
United States Attorney
Paul E. Wommer
Assistant United States Attorney
330 South Third Street, Seventh Floor
Las Vegas, NV 89101
(702) 388-6336

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

-o-

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff,<br>v.<br>MICHAEL ROBERT LAYKIN, DENNIS LEE CRAIN and T L CORPORATION,<br>Defendants. | CR-S-87-10<br>VIOLATION: 18 U.S.C. § 371 – Conspiracy; 12 U.S.C. § 1709-2 – Equity Skimming; 18 U.S.C. § 2 – Aiding and Abetting<br>(Filed Jan. 21, 1987) |

INDICTMENT

COUNT I

(Conspiracy; Aiding and Abetting)

The Grand Jury charges: THAT

At all times relevant to this Indictment, T L CORPORATION, defendant herein, was a Nevada corporation, engaged in the acquisition, rental and disposition of real estate properties in Clark County, State and Federal District of Nevada.

At all times relevant to this Indictment, MICHAEL ROBERT LAYKIN, defendant herein, was President of the T L CORPORATION.

The Conspiracy

Beginning on a date unknown to the Grand Jury, but not later than on or about March 1, 1985, and continuously thereafter and including on or about October 14, 1986, in the State and Federal District of Nevada and elsewhere,

MICHAEL ROBERT LAYKIN,
DENNIS LEE CRAIN,
and
T L CORPORATION,

defendants herein, did willfully and knowingly combine, conspire, confederate, and agree with each other and with diverse other persons unknown to the Grand Jury, to commit the following offense against the United States, that is; [sic] to wilfully with intent to defraud, engage in a pattern and practice of purchasing single-family dwellings which were in default within one year subsequent to their purchase by the defendants, the loans on said dwellings being secured by mortgages or deeds of trust insured or held by the United States Secretary of Housing and Urban Development, by and through the Federal Housing Administration (hereinafter referred to as F.H.A.) or the Veterans Administration (hereinafter referred to as V.A.), the defendants failing to make payments under said mortgages or deeds of trust as the payments became due, and defendants applying and authorizing the application of rents from said dwellings from the defendants [sic] own use, all in violation of Title

12, United States Code, Section 1709-2, and Title 18, United States Code, Section 2.

## OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the defendants performed the following overt acts:

1. On or about August 30, 1985, MICHAEL ROBERT LAYKIN, as President of T L CORPORATION and DENNIS LEE CRAIN, as agent for T L CORPORATION, entered into a Purchase Agreement for the purchase of the one-family dwelling at 217 Montello, Las Vegas, Nevada, with Carolina Villaluz, seller.

2. On or about October 1, 1985, P.M. Corporation, agent for T L CORPORATION rented the dwelling located at 217 Montello, Las Vegas, Nevada, to Theodore Thompson, for the monthly rental of four hundred seventy-five dollars ($475.00).

3. Between on or about September 15, 1985, and on or about July 14, 1986, the defendants failed to make mortgage payments due and owing to the mortgage, First Western Savings, Las Vegas, Nevada, for the dwelling located at 217 Montello, Las Vegas, Nevada.

4. On or about December 11, 1985, MICHAEL ROBERT LAYKIN, as President of T L CORPORATION and DENNIS LEE CRAIN, as agent for T L CORPORATION, entered into a Purchase Agreement for the purchase of the one-family dwelling at 6455 [sic] Hartwood, Las Vegas, Nevada, with Cynthia J. Peterson, seller.

5. On or about January 15, 1985, P.M. Corporation, agent for T L CORPORATION rented the dwelling located at 6445 Hartwood, Las Vegas, Nevada, to Donald Crosswhite, for the monthly rental of five hundred dollars ($500.00).

6. Between on or about February 9, 1986, and on or about July 18, 1986, the defendants failed to make mortgage payments due and owing to the mortgagee, Nevada Savings and Loan Association, Las Vegas, Nevada, for the dwelling located at 6445 Hartwood, Las Vegas, Nevada.

7. On or about October 24, 1985, MICHAEL ROBERT LAYKIN, as President of T L CORPORATION and DENNIS LEE CRAIN, as agent for T L CORPORATION, entered into a Deed of Trust, for the purchase of the one-family dwelling at 376 North 14th Street, Las Vegas, Nevada, with Jan D. Carpenter, seller.

8. On or about November 1, 1985, P.M. Corporation, agent for T L CORPORATION rented the dwelling located at 376 North 14th Street, Las Vegas, Nevada, to Kim Cowgill, for the monthly rental of four hundred fifty dollars ($450.00).

9. Between on or about November 1, 1985, and on or about August 18, 1986, the defendants failed to make mortgage payments due and owing to the mortgagee, Security Pacific Bank, Denver, Colorado, for the dwelling located at 376 North 14th Street, Las Vegas, Nevada.

— 10. On or about August 23, 1985, MICHAEL ROBERT LAYKIN, as President of T L CORPORATION and DENNIS LEE CRAIN, as agent for T L CORPORATION, entered into a Deed of Trust for the purchase of the one-

family dwelling at 4051 Village Square, Las Vegas, Nevada, with Michael Joseph Herris, seller.

11. On or about August 23, 1985, P.M. Corporation, agent for T L CORPORATION rented the dwelling located at 4051 Village Square, Las Vegas, Nevada, to Michael Joseph Herris, for the monthly rental of five hundred seventy-five dollars ($575.00).

12. Between on or about September 1, 1985, and on or about September 16, 1986, the defendants failed to make mortgage payments due and owing to the mortgagee, Margaretten and Company, Newark, New Jersey, for the dwelling located at 4051 Village Square, Las Vegas, Nevada.

13. On or about September 10, 1985, MICHAEL ROBERT LAYKIN, as President of T L CORPORATION and DENNIS LEE CRAIN, as agent for T L CORPORATION, entered into a Deed of Trust, for the purchase of the one-family dwelling at 4440 East Boston, Las Vegas, Nevada, with B & G CORPORATION, seller.

14. On or about October 1, 1985, P.M. Corporation, agent for T L Corporation rented the dwelling located at 4440 East Boston, Las Vegas, Nevada, to Scott Lemon, for the monthly rental of five hundred dollars ($500.00).

15. Between on or about October 1, 1985, and on or about October 14, 1986, the defendants failed to make mortgage payments due and owing to the mortgagee, Colwell Financial Corporation, for the dwelling located at 4440 East Boston, Las Vegas, Nevada.

16. On or about September 16, 1985, MICHAEL ROBERT LAYKIN, as President of T L CORPORATION and

DENNIS LEE CRAIN, as agent for T L CORPORATION, entered into a Deed of Trust for the purchase of the one-family dwelling at 4190 Old Cabin Lane, Las Vegas, Nevada, with B & G CORPORATION, seller.

17. On or about October 1, 1985, P.M. Corporation, agent for T L CORPORATION rented the dwelling located at 4190 Old Cabin Lane, Las Vegas, Nevada, to Carolyn Lovett, for the monthly rental of five hundred twenty-five doilars ($525.00).

18. Between on or about October 1, 1985, and on or about May 20, 1986, the defendants failed to make mortgage payments due and owing to the mortgagee, Old Stone Mortgage Company, Seattle, Washington, for the dwelling located at 4190 Old Cabin Lane, Las Vegas, Nevada.

All in violation of Title 18, United States Code, Section 371 and Section 2.

COUNT II
(Equity Skimming; Aiding and Abetting)

The Grand Jury further charges: THAT

MICHAEL ROBERT LAYKIN,
DENNIS LEE CHAIN,
and
T L CORPORATION,

defendants herein, beginning on a date unknown to the Grand Jury, but no later than on or about March 1, 1985, and continously [sic] thereafter and up to including on or about October 14, 1986, within the District of Nevada, willfully and with intent to defraud, engaged in the following pattern and practice:

1. Defendants purchased six (6) single-family dwellings as indicated below under the column designated "The Dwellings"; the dwellings being in default within one year following their purchase by defendants; the loans on said dwellings being secured by mortgages or deeds of trust insured by the Secretary of Housing and Urban Development, by and through the Federal Housing Administration (hereinafter referred to as F.H.A.) or Veterans Administration (hereinafter referred to as V.A.), as indicated below under the column headed "Guarantor".

2. Defendants failed to make payments under the mortgages and deeds of trust on the dwellings as payments became due.

3. Defendants rented the dwellings to various tenants and applied and authorized the application of the rents to the defendants own use and benefit;

| "The Dwellings" | "Guarantor" |
|---|---|
| 1. 217 Montello, Las Vegas, Nevada; | F.H.A |
| 2. 6445 Hartwood, Las Vegas, Nevada; | F.H.A. |
| 3. 376 North 14th Street, Las Vegas, Nevada; | V.A. |
| 4. 4051 Village Square, Las Vegas, Nevada; | F.H.A. |
| 5. 4440 East Boston, Las Vegas, Nevada; | F.H.A. |
| 6. 4190 Old Cabin Lane, Las Vegas, Nevada. | V.A. |

all in violation of Title 12, United States Code, Section 1709-2 and Title 18, United States Code, Section 2.

A TRUE BILL.

/s/ Clayton S. Powell
FOREPERSON OF
THE GRAND JURY

WILLIAM A. MADDOX
United States Attorney

/s/ James W. Erbeck
JAMES W. ERBECK
Assistant United States Attorney

Supreme Court, U.S.
FILED
MAY 11 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1426

# In the Supreme Court of the United States

OCTOBER TERM, 1989

MICHAEL ROBERT LAYKIN, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
*Solicitor General*
EDWARD S. G. DENNIS, JR.
*Assistant Attorney General*
THOMAS E. BOOTH
*Attorney*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

BEST AVAILABLE COPY

## QUESTION PRESENTED

Whether knowledge that a mortgage is backed by a federal agency is an element of a violation of 12 U.S.C. 1709-2 (1982), which bars equity skimming on mortgages issued or guaranteed by the Department of Housing and Urban Development or the Veterans Administration.

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# In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1426

MICHAEL ROBERT LAYKIN, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-27) is reported at 886 F.2d 1524.

### JURISDICTION

The judgment of the court of appeals was entered on September 26, 1989. A petition for rehearing was denied on December 7, 1989. The petition for a writ of certiorari was filed on March 7, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a jury trial in the United States District Court for the District of Nevada, petitioner was convicted of

equity skimming, in violation of 12 U.S.C. 1709-2, and conspiracy to commit equity skimming, in violation of 18 U.S.C. 371.[1] He was sentenced to a total of six months' imprisonment, five years' probation, a period of community service, and restitution. The court of appeals affirmed. Pet. App. 1-27.

1. Petitioner and Robert Terry were principal officers in the T.L. Corporation. In conjunction with a Century 21 office owned by Terry, the company acquired more than 100 single family residences in the Las Vegas, Nevada, area. Dennis Crain, an independent agent working for T.L. Corporation, identified the properties for purchase, and petitioner negotiated the sales. Pet. App. 5.

T.L. Corporation purchased homes with existing mortgages and agreed to make the payments on those mortgages. The sales were negotiated so that the original mortgage lenders were not apprised of the sales. If the seller

[1] 12 U.S.C. 1709-2 provides, in pertinent part:

> Whoever, with intent to defraud, willfully engages in a pattern or practice of –
>
> (1) purchasing one- to four-family dwellings (including condominiums and cooperatives) which are subject to a loan in default at time of purchase or in default within one year subsequent to the purchase and the loan is secured by a mortgage or deed of trust insured or held by the Secretary of Housing and Urban Development or guaranteed by the Veterans' Administration, or the loan is made by the Veterans' Administration,
>
> (2) failing to make payments under the mortgage or deed of trust as the payments become due, regardless of whether the purchaser is obligated on the loan, and
>
> (3) applying or authorizing the application of rents from such dwellings for his own use,
>
> shall be fined not more than $250,000 or imprisoned not more than 5 years or both. * * * Nothing in this section shall apply to the purchaser of one such dwelling.

had equity in his home, T.L. Corporation gave him a note for the amount of the equity, secured by a deed of trust. The note provided for monthly interest payments and a balloon payment for the capital after a term of years. Pet. App. 5-6. The properties that T.L. Corporation purchased were then put on the rental market.

Century 21 managed the properties and collected the rents but was not permitted to make the mortgage payments. After deducting a 10% fee and the funds necessary to maintain the upkeep on the properties, Century 21 remitted the remainder of the rental proceeds to petitioner or Terry. Despite the agreement by T.L. Corporation to make the mortgage payments, no mortgage payments on the properties were made. Pet. App. 6.

In August 1985, the former homeowners began to complain to the rental office that they were receiving notices from their mortgage lenders that payment had not been made on their mortgages. Because T.L. Corporation had not assumed the mortgages, the lenders informed the former owners that they were still liable on those debts. Century 21 informed petitioner of the complaints, but neither petitioner nor Terry made the payments. After October 1985, Century 21 refused to manage T.L. Corporation's properties. Pet. App. 6.

Crain then contracted with another rental agent, PM Corporation, to manage the properties. PM Corporation was directed to remit the excess rental payments into its own trust account instead of paying them directly to petitioner. Later, petitioner directed the rental agents to send funds to various people, to write checks totalling $9,000 directly to him or to companies controlled by him, and to issue checks totalling $2,000 to Crain. Pet. App. 6-7.

PM Corporation began to receive complaints from former homeowners about nonpayment of mortgages and eventually resigned as rental agent. By the winter of 1985,

most of the homes owned by T.L. Corporation were in foreclosure proceedings. Six of the properties had mortgages that were insured by the Veterans Administration (VA) or the Federal Housing Administration (FHA). The mortgages on those properties went into default, resulting in losses of more than $100,000 to the federal government. Pet. App. 7. Petitioner and Crain were then tried and convicted on charges of equity skimming.

2. The court of appeals upheld petitioner's conviction. It rejected petitioner's argument that Section 1709-2 is ambiguous as to whether a defendant has to know that a federal agency insured the loans, and that the "rule of lenity" therefore requires that such knowledge be charged and proved. Pet. App. 9. The court stated that "[o]n its face, the statute does not require such knowledge; and there appears to be no reason that it should." Pet. App. 11. The court stated that the statutory requirement that the mortgages be insured by a federal agency is a jurisdictional provision of the kind as to which knowledge is normally not required. In addition, the court noted that the structure of the statute is consistent with that interpretation, because the phrases setting forth the mental elements of the crime are set off from the language requiring that the loans be guaranteed or held by the federal government. Pet. App. 8-14.[2]

[2] The court of appeals also rejected petitioner's challenges to the sufficiency of the evidence, the sufficiency of the indictment, the admission of evidence involving another equity skimming operation, and the jury instructions. Pet. App. 14-27. Petitioner does not renew these arguments before this Court except insofar as they relate to his contention that knowledge of the federal guarantee on the mortgage is an element of the equity skimming offense.

## ARGUMENT

Petitioner renews his contention (Pet. 6-17) that Section 1709-2 requires proof that he knew the mortgages on his property were guaranteed or held by the FHA or the VA, and that his conviction must be reversed because the indictment did not charge, and the jury was not required to find, that he possessed that knowledge. The court of appeals correctly decided that issue, and its decision does not conflict with any decision of this Court or of any other court of appeals.

1. The structure of Section 1709-2 supports the court of appeals' conclusion that knowledge that mortgages are backed by the FHA or VA is not an element of a violation of Section 1709-2. The statute contains two *mens rea* requirements: acting with an intent to defraud, and "willfully engag[ing] in a pattern or practice" of purchasing dwellings subject to a loan that is in default or goes into default within a year, failing to make mortgage payments on the dwellings, and appropriating the rental income from the properties. The reference to the federal nexus is part of a separate clause in the statute that requires that "the loan [be] secured by a mortgage or deed of trust insured or held by [HUD] or guaranteed by the [VA] or the loan is made by the [VA]." The natural reading of the statute is that the defendant must willfully engage in the proscribed pattern or practice, but that no willfulness or knowledge must attach to the facts establishing the federal nexus. As the court of appeals observed (Pet. App. 13),

> the term 'willfully' is part of a disjunctive sentence. The natural reading of the sentence is that the defendant must willfully participate in a pattern of purchasing one- to four-family dwellings, *and*, in addition, that the houses must be insured by the federal govern-

ment. The final clause is a separate component not modified by a knowledge requirement."[3]

Because the plain language of the statute rebuts petitioner's proposed construction, petitioner's reliance (Pet. 7) on the rule of lenity is misplaced. The rule of lenity does not mandate that criminal statutes be given the narrowest possible construction; rather, it applies only when a criminal statute is ambiguous. Because Section 1709-2 admits of only one plausible construction, the rule of lenity is inapplicable here. See *United States* v. *Yermian*, 468 U.S. 63, 70 n.7 (1984); *Huddleston* v. *United States*, 415 U.S. 814, 831-832 (1974).

2. The conduct reached by Section 1709-2 is plainly improper, quite apart from whether the defendant knew that the mortgages were federally guaranteed. Section 1709-2 punishes a form of theft involving the appropriation of a third party's money or property for one's own use, and requires that the conduct be undertaken with an "intent to defraud." In that respect, this case closely resembles *United States* v. *Feola*, 420 U.S. 671, 693-694 (1975). In *Feola*, the Court held that knowledge that the

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[3] The structure of Section 1709-2 can be contrasted, for example, with the phrasing of the statute at issue in *Liparota* v. *United States*, 471 U.S. 419, 420 (1985). In *Liparota*, the defendant's conviction under a federal statute prohibiting the misuse of food stamps was overturned because the government had failed to prove that the defendant knew his use was unlawful. The key provision penalized anyone who "knowingly uses, transfers, acquires, alters, or possesses [food stamps] in any manner not authorized by the statute or the regulations." The structure of that statute, in which the adverb describing the requisite state of mind modifies one continuous phrase containing the requirement of lack of authorization, is quite different from the structure of Section 1709-2, in which the description of the types of mortgages that can be the subject of a violation is contained in a separate clause, with a new subject and predicate, from the modifier "willfully."

intended victim was a federal officer was not a prerequisite for the crime of assault on a federal officer in violation of 18 U.S.C. 111, or conspiracy to assault a federal officer. The court observed that "[t]he situation is not one where legitimate conduct becomes unlawful solely because of the identity of the individual or agency affected." 420 U.S. at 685. Because the conduct punished by the statute was inherently wrongful, the absence of a requirement of knowledge of the identity of the person assaulted posed "no risk of unfairness to defendants" and created "no snare for the unsuspecting." *Ibid.*[4]

3. An additional factor supporting the ruling of the court of appeals is that the provision as to which the court found no requirement of knowledge is a jurisdictional element, and this Court and others have routinely held that federal statutes need not be construed to require knowledge of jurisdictional elements. In *United States* v. *Yermian*, 468 U.S. 63, 68 (1984), the Court held that 18 U.S.C. 1001, which criminalizes lying to a federal agency in any matter within its jurisdiction, embodies a *mens rea* requirement that does not depend on the defendant's

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[4] In this respect as well, this statute differs from the statute at issue in *Liparota* v. *United States*, *supra*. If the statute in that case were not construed to require knowledge that the food stamp transaction was unauthorized, it would encompass "a broad range of apparently innocent conduct." 471 U.S. at 426. Since "criminal offenses requiring no *mens rea* have a 'generally disfavored status,' " *ibid.* (citing, *inter alia*, *Morissette* v. *United States*, 342 U.S. 246, 252-253 (1952)), the Court in *Liparota* was reluctant to construe Section 2024(b)(1) to dispense with any requirement of criminal intent in the absence of unequivocal indication of Congress's intent to create such a proscription.

knowledge of federal agency jurisdiction. The Court held that the primary purpose of the jurisdictional element "is to identify the factor that makes the false statement an appropriate subject for federal concern." 468 U.S. at 68. The Court added that "[j]urisdictional language need not contain the same culpability requirement as other elements of the offense." *Ibid.*; see also *United States* v. *Feola*, 420 U.S. at 685 ("criminal intent does not * * * require that the actor understand not only the nature of his act but also its consequence for the choice of a judicial forum"). The courts of appeals have confirmed that knowledge of the circumstance that confers federal jurisdiction is not ordinarily an element of a federal criminal statute. See, *e.g.*, *United States* v. *Ardito*, 782 F.2d 358, 360-362 (2d Cir.) (knowledge that proceeding is federal not required under obstruction of justice statute, 18 U.S.C. 1503), cert. denied, 475 U.S. 1141 (1986); *United States* v. *Montoya*, 716 F.2d 1340, 1344-1345 (10th Cir. 1983) (knowledge of federal status not required under false claims statute, 18 U.S.C. 287); *United States* v. *Speir*, 564 F.2d 934, 937-938 (10th Cir. 1977) (en banc) (knowledge of government ownership of property not required under federal theft statute, 18 U.S.C. 641), cert. denied, 435 U.S. 927 (1978); *United States* v. *Blassingame*, 427 F.2d 329 (2d Cir. 1970) (knowledge of interstate character of wire use not needed for violation of wire fraud statute, 18 U.S.C. 1343), cert. denied, 402 U.S. 945 (1971).[5]

[5] Petitioner claims (Pet. 9-11) that the requirement of VA or FHA insurance is not "jurisdictional" because Congress could have enacted a broader equity skimming statute that covered mortgages held by a

The court of appeals in *United States* v. *Sorrow*, 732 F.2d 176, 178 (11th Cir. 1984) employed a similar analysis to conclude that a conviction for conspiracy to defraud the United States in violation of 18 U.S.C. 371 required only that the "defendant's actions support[] a finding he intended to defraud, without a showing that he was aware of the federal interest which might be affected." 732 F.2d at 177. The court stated (*id.* at 178-179):

> Congress' inclusion of the target offense of defrauding the United States in section 371 evidences a concern with protecting the federal fisc. The desire to protect the federal treasury, like the desire to protect federal officers [as in *Feola*], would be unduly and arbitrarily circumscribed by a [*sic*] requiring proof of anti-federal intent. Whether persons who plan to defraud the United States in fact realize that federal dollars are the object of their scheme is irrelevant to the goal of safeguarding federal fiscal resources. Convicting such persons without requiring proof of anti-federal intent would not convert section 371 into a "snare for the unsuspecting." Fraud, like assault, involves wrongful conduct.

4. Contrary to petitioner's suggestion (Pet. 14-16), the decisions of the courts of appeals in *United States* v. *Nofziger*, 878 F.2d 442 (D.C. Cir.), cert. denied, 110 S. Ct. 564 (1989), and *United States* v. *Johnson & Towers, Inc.*, 741 F.2d 662 (3d Cir. 1984), are not in conflict with the decision in this case. For one thing, neither *Nofziger* nor *Johnson & Towers* involved the question whether a statute

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federally chartered bank. But a requirement that defines the scope of a crime need not be as broad as possible in order for that requirement—here, that the mortgages be backed by the FHA or the VA—to serve to create the interest that establishes federal jurisdiction.

required knowledge of a federal jurisdictional requirement. In *Nofziger*, the court held that a former government official cannot be held to violate the Ethics in Government Act of 1978, 18 U.S.C. 207(c), unless he knows that the particular matter on which he makes a communication is pending before his former agency. See 878 F.2d at 445-446. The court reached that conclusion because it found the statute to be ambiguous and because dispensing with the requirement of knowledge on the issue of the pendency of the matter on which the defendant was communicating "would be to criminalize a broad range of apparently innocent conduct." 878 F.2d at 453 (quoting *Liparota*, 471 U.S. at 426). Here, in contrast, the pertinent statutory language (which sets apart the background condition that a mortgage be federally insured in a separate phrase) is not ambiguous, and the degree of blameworthiness of the conduct does not turn on the defendant's knowledge of the federal connection with the mortgages.

In *Johnson & Towers*, 741 F.2d at 665, the court construed 42 U.S.C. 6928(d), which penalizes "[a]ny person who * * * (2) knowingly treats, stores, or disposes of any hazardous waste * * * (A) without having obtained a permit * * * or (B) in knowing violation of any material condition or requirement of such permit." The court held that the term "knowingly" in that provision applied to the failure to obtain a permit. The court concluded that any other construction would be "arbitrary and nonsensical." Subsection (2)(B) of the statute, the court noted, imposes a penalty for handling hazardous waste in violation of any condition embodied in a permit only if that violation is "knowing." The court reasoned that it would make little sense "to subject to criminal prosecution those persons who acted when no permit had been obtained irrespective of their knowledge (under subsection (A)), but not those persons who acted in violation of the terms of a permit

unless that action was knowing (subsection (B))." 741 F.2d at 668. The decision in *Johnson & Towers* thus turned on unique features of the statute at issue; the court's analysis has little bearing on the provision at issue here.[6]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
*Solicitor General*
EDWARD S. G. DENNIS, JR.
*Assistant Attorney General*
THOMAS E. BOOTH
*Attorney*

MAY 1990

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[6] Likewise, petitioner's reliance (Pet. 8) on *United States* v. *Capano*, 786 F.2d 122 (3d Cir. 1986), for the proposition that Section 1709-2 is ambiguous is misplaced. In *Capano*, the Court held merely that the statute barring equity skimming of multi-family houses, 12 U.S.C. 1715z-4, is ambiguous with respect to the question whether it applies even though the mortgagor did not receive an extension of time to cure the default. *Capano* thus has no bearing on the question presented here.

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In The

# Supreme Court of the United States

October Term, 1989

MICHAEL ROBERT LAYKIN,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## REPLY TO BRIEF IN OPPOSITION

ROBERT C. MOEST
*Counsel of Record*
DAVID GROSZ
FLEISHMAN, FISHER & MOEST
2049 Century Park East
Suite 3160
Los Angeles, California 90067
(213) 557-1077

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

1. Two decisions too recent to have been available at the time the petition here was filed demonstrate the Court's vigilance in assuring application of the rule of lenity to federal criminal statutes.

In *Crandon v. United States*, 110 S. Ct. 997 (1990) (Nos. 88-931, 88-938), the Court "granted certiorari to review the Court of Appeals' construction of [an] . . . important statute," and, in its decision filed February 27, 1990, reaffirmed that the rule of lenity requires that "any ambiguity" over a criminal statute's scope "should be resolved in petitioners' favor unless and until Congress plainly states that we have misconstrued its intent." That is, "[t]o the extent that the language or history of [a criminal statute] . . . is uncertain, this 'time-honored interpretive guideline' serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability." *Accord, Hughey v. United States*, 58 U.S.L.W. 4570, 4573 (U.S. May 21, 1990) (No. 89-5691) ("[L]ongstanding principles of lenity . . . demand resolution of ambiguities in criminal statutes in favor of the defendant . . . ."). Indeed, application of the rule of lenity was of sufficient importance that the Court granted certiorari in *Crandon* to consider the question even though the criminal statute there at issue was being applied in a *civil* case.

As petitioner has noted, Petition for Certiorari at 8 [hereinafter Pet.], the "equity skimming" statute, 12 U.S.C. § 1709-2, is an important law to which federal prosecutors have increasingly frequent resort. It closely resembles in this respect the anti-supplemental pay statute considered in *Crandon*. Also like the statute in *Crandon*, there is little doubt that section 1709-2 is – despite

the government's protestations to the contrary – ambiguous as to a critical element – here, whether proof of knowledge of federal financing is necessary to convict. Certiorari should accordingly be granted to review the Ninth Circuit's determination that no ambiguity exists.

2. The government's contention that the "structure of Section 1709-2 supports" the claim that a defendant need have no notion of federal involvement, *see* Brief in Opposition at 5 [hereinafter Br. Opp.], does not gainsay the inherent ambiguity of the statute on this point. Nor is it an answer that "[t]he reference to federal nexus is part of a separate clause . . . ." *Id.* The statute may well be ungrammatical when it comes to the federal-involvement requirement, but that aside, the fact remains that provision *follows* the overall requirement that the defendant "willfully engage[] in a pattern and practice," and therefore appears to be in pari materia with the "purchasing" provision that precedes it within the first part of the definition of the offense. The government is simply incorrect that the language "admits of only one plausible construction." Br. Opp. 6.

3. Petitioner has noted that "equity skimming" is a new crime that exists only by virtue of this statute. Pet. 10-11. This case – in which any government losses are exclusively attributable to an overall decline in the relevant housing market, a circumstance for which petitioner can hardly be blamed – stands to refute the government's claim that "Section 1709.2 punishes a form of theft involving the appropriation of a third party's money or property for one's own use." Br. Opp. 6. Nothing in the statute requires a showing of "theft" or "appropriation" of another's property. It is thus far removed from the general

understanding of criminal fraud, under which the defendant must "obtain[] from the defrauded person some specified thing of value." *People v. Jordan*, 66 Cal. 10, 4 P. 773, 774 (1884) (citing English and Massachusetts law and a leading textbook writer). The substantive acts included in the law – purchasing properties in default, failing to make mortgage payments, and using rents for owner's own purposes – can easily be, and normally are, entirely innocent incidents of the market's operation that occur every day. It is plain that they need not, and here did not – "intent to defraud" or no – result in the taking of anyone else's property.

4. The rule of lenity is, similarly, not defeated by the claim that the provision is "jurisdictional." Br. Opp. 7. A federal-involvement requirement in general may or may not be a substantive element of a criminal statute; it is not a talisman that renders a serious inquiry into ambiguity unnecessary. *See* Pet. 9-10. Unlike 18 U.S.C. § 371, construed in *United States v. Sorrow*, 732 F.2d 176 (11th Cir. 1984), *quoted in* Br. Opp. 9, in section 1709-2, a willfulness requirement appears specifically to control the element of federal relationship.

5. The government argues that neither *United States v. Nofziger*, 878 F.2d 442 (D.C. Cir.), *cert. denied*, 110 S. Ct. 564 (1989), nor *United States v. Johnson & Towers, Inc.*, 741 F.2d 662 (3d Cir. 1984), conflicts with the decision below because neither "involved the question whether a statute required knowledge of a federal jurisdictional requirement." Br. Opp. 9-10. The government's purported distinction depends on its conclusion that the VA or FHA requirement is no more than jurisdictional. The same might have been said about the "direct and substantial

interest" aspect of 18 U.S.C. § 207(c) considered in *Nofziger*.

In any event, the government does not respond to petitioner's principal point concerning *Nofziger* and *Johnson & Towers*. In finding ambiguity in the sweep of the word "knowingly" in a criminal statute, *Nofziger* and *Johnson & Towers* engaged in a far more careful consideration of the ambiguity created by statutory modifiers than did the court below. *Laykin* conflicts with *Nofziger* and *Johnson & Towers* because *Laykin* engaged in the critical initial inquiry for application of the rule of lenity – whether an ambiguity exists – in a cursory and mechanical manner incompatible with the analysis employed by *Nofziger* and *Johnson*.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

ROBERT C. MOEST
*Counsel of Record*
DAVID GROSZ
FLEISHMAN, FISHER & MOEST
2049 Century Park East
Suite 3160
Los Angeles, California 90067
(213) 557-1077